

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337

**REPLY COMMENTS OF  
FAIRPOINT COMMUNICATIONS, INC.**

FairPoint Communications, Inc. (“FairPoint”) submits these reply comments<sup>1</sup> in response to the Opposition of the National Cable & Telecommunications Association (“NCTA”) to FairPoint’s Petition for Waiver To Exclude IAS, ICLS And LSS From The Requirement To Repurpose Frozen High-Cost Support Toward Broadband Deployment In 2013 And Beyond (the “Petition”).<sup>2</sup> The record supports grant of the Petition. NCTA’s opposition states no basis to deny the petition, and incorrectly summarizes the law in several respects. NCTA’s members serve some of the most densely populated portions of the exchanges that FairPoint serves, but only FairPoint as the carrier-of-last-resort (“COLR”) serves all consumers in its service territories, even in the highest-cost areas, upon request. If the Commission were to deny the Petition, FairPoint would be left with inadequate support, and could be unable to maintain current levels of service in those high-cost areas that no other carriers have chosen to serve,

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<sup>1</sup> See Public Notice, *Wireline Competition Bureau Seeks Comment on FairPoint Communications, Inc. Petition for Waiver of Certain High-Cost Universal Service Rules*, DA 13-213 (rel. Feb. 14, 2013) (“Public Notice”).

<sup>2</sup> See *Connect America Fund; High-Cost Universal Service Support*, FairPoint Communications, Inc. Petition For Waiver To Exclude IAS, ICLS And LSS From The Requirement To Repurpose Frozen High-Cost Support Toward Broadband Deployment In 2013 And Beyond, WC Docket Nos. 10-90 and 05-337 (filed Feb. 8, 2012) (“Petition” or “FairPoint Petition”).

leaving consumers in these areas without reasonably comparable service at reasonably comparable rates, as mandated by the Communications Act.

**I. WITHOUT A WAIVER, PRICE CAP CARRIERS MUST SPEND FROZEN SUPPORT TWICE TO ACCOMPLISH DIFFERENT COMMISSION POLICIES TO THE DETRIMENT OF CONSUMERS**

**A. Keeping Rates For Existing Services Affordable Is An Important FCC Policy Accomplished With Frozen Support**

Frozen support is transitional support, bridging the transition between the old universal service regime and the new regime. While investment in broadband infrastructure surely advances the Commission's policies, NCTA utterly ignores the Commission's directive policy that voice services should be universally available at affordable rates.<sup>3</sup> It is neither necessary nor appropriate that frozen Interstate Common Line Support (ICLS), Interstate Access Support ("IAS"), and Local Switching Support ("LSS") be repurposed for broadband expansion during this transition to Connect America Fund ("CAF") Phase II.

The Commission's broadband expansion efforts already are well under way with implementation of the CAF Phase I. The Commission is supporting broadband in unserved portions of price cap territories through CAF Phase I incremental support as well as those portions of frozen high-cost funding that are loop cost expense adjustment, which are intended to support the intrastate portion of common line infrastructure deployment and operation (Safety

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<sup>3</sup> NCTA suggests that legacy universal service programs achieved no particular policy goals. *See Connect America Fund; FairPoint Communications, Inc. Petition for Waiver of Section 54.313(c) of the Commission's Rules*, Opposition of the National Cable & Telecommunications Association, WC Docket No. 10-90, at 2 (filed March 18, 2013) ("NCTA Opposition"). While NCTA and its members may be less than familiar with the provision of high-quality, affordable, universally available voice service, it is a supported service under the Communications Act, and it remains a required service of all eligible telecommunications carriers. *See, e.g., Connect America Fund*, Fifth Order on Reconsideration, 27 FCC Rcd 14549, ¶20 (2013) ("*Fifth Order on Reconsideration*"); *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶540 (2011) ("*USF/ICC Transformation Order*").

Net Additive (“SNA”), High-Cost Loop Support (“HCLS”), and High-Cost Model Support (“HCMS”)) by transferring a portion of intrastate expense to the interstate jurisdiction.<sup>4</sup> Indeed, the Commission has acknowledged that legacy high-cost common line support has been used for some time to enhance loop plant that supports both voice and broadband services. Nothing in the Petition would alter that practice. Indeed, FairPoint does not seek a waiver of the broadband obligations of Section 54.313(c) with respect to SNA, HCLS or HCMS. NCTA is wrong, therefore, to imply that granting the Petition would be inconsistent with the Commission’s broadband development goals. FairPoint is using the appropriate portions of frozen support as well as incremental support to deploy broadband in its service areas. With respect to IAS, ICLS, and LSS, however, the same dollars simply cannot be used for inconsistent purposes. As explained in the Petition, FairPoint’s current services would be adversely affected if the Petition were not granted.

NCTA incorrectly implies that all frozen CAF Phase I support was intended to be directed to broadband infrastructure. In fact, in adopting the CAF regime, the Commission explicitly recognized that it was not working with a “blank slate” but with a “decades-old regulatory system” that included substantial legacy obligations “including state carrier of last resort obligations for telephone service.”<sup>5</sup> In CAF Phase I, the Commission replaced legacy support for voice networks with two different mechanisms, *incremental* support for broadband deployment in unserved areas, and *frozen* support which, as its name suggests,

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<sup>4</sup> See Subpart F- High Cost Loop Support of Part 36 of CFR 47. This describes how HCLS, HCMS and SNA are “expense adjustments” for purposes of jurisdictional separations. These therefore differ from LSS, ICLS and IAS in that the latter are specifically targeted to recover costs assigned by Part 36 to the interstate jurisdiction.

<sup>5</sup> *USF/ICC Transformation Order*, ¶165.

kept legacy support at then-current levels until CAF Phase II could be implemented.<sup>6</sup> Contrary to the implications of NCTA’s Opposition, CAF Phase I was adopted to “set the stage for a full transition” to CAF Phase II – it was not intended as a flash cut to the new regime.<sup>7</sup> Furthermore, the incremental support is optional, the frozen support is not.<sup>8</sup> The Commission expected that CAF Phase II would be implemented, and CAF Phase I programs would terminate, on January 1, 2013.<sup>9</sup> Thus, little attention was given to the use of frozen Phase I support in the *USF/ICC Transformation Order*, and the Commission apparently overlooked the tension created by requiring increasing amounts of frozen CAF Phase I support to be devoted to building and operating broadband networks while price cap carriers continue to labor under other federal and state public interest obligations to build, operate, maintain and upgrade voice-grade networks at regulated rates, and serve as COLRs throughout their service territories.<sup>10</sup>

Without a waiver of the obligation to divert a substantial portion of the frozen support previously provided as IAS and LSS, FairPoint would be forced to raise end-user rates through increased subscriber line charges (“SLCs”) and access recovery charges (“ARCs”).<sup>11</sup> Similarly, without a waiver of the obligation to divert one-third of the frozen support previously provided as ICLS, FairPoint would face under-recovery of nearly \$6 million in 2013 alone.<sup>12</sup> The effect of

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<sup>6</sup> *Id.*, ¶128.

<sup>7</sup> *Id.*, ¶129.

<sup>8</sup> *Id.*, ¶144.

<sup>9</sup> *Id.*, ¶148.

<sup>10</sup> In fact, the *USF/ICC Transformation Order* contains only a brief two-paragraph discussion of the scenario in which CAF Phase II would not be implemented on time, and frozen CAF Phase I support would be repurposed to broadband. *Id.*, ¶¶149-150. No analysis of the consequences on incumbent local exchange carrier (“ILEC”) rates or FCC pricing policies appears in the Order.

<sup>11</sup> *See* FairPoint Petition at 12.

<sup>12</sup> *See* FairPoint Petition at 12.

repurposing frozen support is not consistent with the Commission's original intent for this support. Repurposing would substantially harm FairPoint during this transition period to CAF Phase II, and even more importantly would harm consumers who would experience increased rates and whose services could be affected as a result of the repurposing. This would directly contradict the intended purpose of *frozen* support during the CAF Phase I transition. The public interest warrants a grant of the waiver as requested.

FairPoint is still subject to state regulation of rates and costs. This means that, contrary to NCTA's implication, price cap carriers cannot simply recover from their customers what they have lost under the requirement to repurpose legacy support to broadband.<sup>13</sup> Even if price cap carriers could bring state rate cases to raise end-user rates (which is not an option in some states), such a result could undermine their ability to use frozen support as intended – to keep rates affordable. Moreover, the Commission should be wary of a competitor suggesting that a price cap carrier should increase end-user rates and put at risk its capability to serve the highest cost areas where unregulated competitors are not required to serve. Such arguments only serve to handicap one competitor without any consideration for the public interest.

As the Commission moves to CAF Phase II, price cap carriers that choose to accept CAF Phase II support will be able expand broadband in the specific areas targeted by the support, without being forced to accept broadband investment obligations in areas without sufficient support. In the meantime, however, FairPoint requires IAS, ICLS and LSS to keep rates for existing services at reasonable levels. NCTA is correct in noting that this is an either/or

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<sup>13</sup> NCTA Opposition at 5.

proposition – FairPoint cannot spend the same dollars in two different ways.<sup>14</sup> The money should be spent as intended and consistent with the Commission’s policies.<sup>15</sup>

B. Legacy Obligations Are Not Optional

NCTA argues that FairPoint does not need to spend the money on its common line facilities.<sup>16</sup> However, this is simply not true. FairPoint explained in its Petition that the costs of its plant, which support both voice and broadband services, are allocated between the state and interstate jurisdictions. The interstate portion of these costs is associated with the local loop, that is, the “common line,” and is assigned to the interstate Common Line category through Part 69 operations. There is a continuing obligation to follow Parts 36 and 69 of the FCC rules even for the FairPoint study areas that have been converted to price cap regulation. The only way that FairPoint could avoid spending money on common line services would be to stop answering its phones, maintaining its distribution network, maintaining its poles,<sup>17</sup> installing new services, and responding to repair calls. Common line spending is essential to continued operations. FairPoint is now being asked to spend the support it has received to offset common line costs and help keep rates affordable for the additional purpose of broadband expansion -- spending the same

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<sup>14</sup> Notably, NCTA states that “[g]ranting a waiver of the rule necessarily means that millions of dollars in legacy support would be spent by FairPoint on other investments (i.e. not broadband) and/or in other areas ....” NCTA Opposition at 4.

<sup>15</sup> NCTA also misleadingly states that FairPoint’s obligation is “simply to spend \$13 million of the \$39 million it receives *from the government* in a particular way.” NCTA Opposition at 5 (emphasis added). FairPoint has not lost sight of the fact that CAF support, including frozen support, is funding made available through contributions from telecommunications *customers*, not “the government.”

<sup>16</sup> See NCTA Opposition at 4. NCTA incorrectly states “FairPoint is a price cap carrier, and as such, the Commission’s legacy rules do not rely on a review of the costs the company has incurred. Simply put, there is no obligation that it spend the money it receives on common line facilities.” *Id.* The frozen support FairPoint receives is support for FairPoint’s rate of return and price cap operations, although the bulk of that support is for its rate of return carriers.

<sup>17</sup> FairPoint has 1.5 million poles in its northern New England service area alone. The operational impact is real.

amount of money twice.

## **II. FAIRPOINT HAS MET THE REQUIREMENTS FOR A WAIVER OF THE COMMISSION'S RULES ON SPENDING FROZEN SUPPORT**

Granting the Petition is in the public interest because consumers will continue to receive the same services they have been receiving from FairPoint at affordable rates pending the Commission's transition to CAF Phase II.<sup>18</sup> Upon implementation of CAF Phase II, the focus of the Commission's universal service regime will shift to broadband expansion, with broadband build-out requirements targeted to locations where CAF Phase II funding is received.<sup>19</sup> FairPoint has adequately demonstrated the public interest benefit of granting the requested waiver with respect to frozen CAF Phase I support.

NCTA incorrectly states that the Petition is inadequate unless accompanied by a detailed cost and earnings review demonstrating that customers "face a significant risk of losing access to a broadband-capable network that provides both voice as well as broadband today, at reasonable comparable rates." The waiver test cited by NCTA, adopted in the *USF/ICC Transformation Order* and modified in the *Fifth Order on Reconsideration*, applies to waiver requests by carriers objecting to *support reductions* under the new universal service regime.<sup>20</sup> The Petition does not allege that FairPoint is facing a support reduction; the Petition concerns *frozen* support, and the apparently inadvertent inconsistencies between the purposes for which frozen support is to be applied.<sup>21</sup> The waiver standard cited by NCTA is inapplicable. In fact, it does not appear that

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<sup>18</sup> *USF/ICC Transformation Order*, ¶¶ 57, 61, and 194.

<sup>19</sup> *Id.* ¶¶ 11, 16, 59, 116, and 128.

<sup>20</sup> *See, e.g., Fifth Order on Reconsideration*, ¶¶ 19-21 (waiver will be granted "only in those circumstances in which the petitioner can demonstrate that *reductions* in existing high-cost support would put consumers at risk of losing voice service") (emphasis added) (*citing USF/ICC Transformation Order*, ¶540).

<sup>21</sup> *See* FairPoint Petition at 8-16.

the Commission anticipated the conflict between its frozen high-cost support rules and its pricing rules and policies – otherwise, it no doubt would have drafted the rules so as to avoid the conflict.

### **III. CONCLUSION**

For these reasons, FairPoint continues to urge the Commission to grant its requested waiver of the Commission's Rules 47 C.F.R. § 54.313(c). Only allowing FairPoint to continue to use IAS, ICLS and LSS for the purpose for which they are intended until Phase II is fully implemented would avert the impact of a forced flash cut, and protect consumers in the process, as the Commission sought to do.

Respectfully submitted,

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